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Department of Legislation

Charles B. Nutting, Editor-in-Charge

Recent interest in planning and zoning makes the publication of the following article highly appropriate. The author is a Professor of Law in Indiana University, and is a recognized authority in the fields of land utilization and of legislation.

Sanctions Against Governmental Violations of Planning and Zoning Ordinances by Frank E. Horack, Jr.

Apparently it is a characteristic of sovereignty, whether it be regal or democratic, to be unwilling to live by its own law. Typically, the executive, legislative and judicial branches of government support the sovereign's claim of immunity. Not infrequently the legislature expressly exempts the sovereign from statutory regulation. And the judiciary, in cases of ambiguity, strictly construe statutes because they are in "derogation of sovereignty".

This exemption of the sovereign from control is exemplified by statutes authorizing local units of government to adopt planning and zoning ordinances. Almost without exception, the legislature provides that "the powers extended to agencies, bureaus, departments, commissions, divisions, or officials of the state government by other state statutes . . . shall remain in full force and effect. Powers of supervision and regulation by such divisions of the state government over city, town, county, township and other local governmental units, individuals, firms or corporations also are not abrogated and shall continue in full effect."¹ Thus, the state remains outside local planning and land use control. The state is free to locate a new state highway garage in a single family residence district and destroy or materially damage the municipality's comprehensive plan.

No doubt it is also logical to exempt state regulated public utilities.

But when they procure rights of way, particularly for oil and natural gas pipelines, without regard for the local plan they frequently remove hundreds of acres of land from local development and often from any practical use. Other utility exemptions are even more difficult to justify. For example, in at least one case, a local ordinance excluding motels and trailer camps was declared invalid because motels are like "inns" which at common law were utilities.²

Nor is the state the only offender. The expansion of federal services and activities has made the national government one of the largest, if not the largest, landowner today, and in the hierarchy of sovereigns it consistently asserts immunity from both state and local action.³ Even where it is not directly a landowner, but regulates the activities of others, it may claim immunity. Thus local zoning which interferes with municipal air fields may be an invasion of federal sovereignty.⁴ And where it is a participant in an interstate compact restricting land use it con-

sistently reserves its power not to be bound by the compact.⁵

Adjacent municipalities by their independent action, interfere with or destroy the value of the master plan of their neighbors. Thus where two cities had common boundaries and both boundaries were zoned residential the New Jersey court found a vested right in the residential occupants of one city to prevent the change of land use in the other.⁶ Other cases reflect the growing recognition by courts that in metropolitan areas the jurisdictional boundary of one municipality does not give it complete freedom to plan and manage land use without relation to the total urbanized area.⁷ Inevitably, as Suburbia grows, the jurisdictional conflict must be resolved on a metropolitan basis.⁸

Paradoxically, the most frequent and probably the most serious violator of a city's comprehensive plan is the city itself. Most zoning ordinances declare that⁹

after the adoption of a comprehensive plan by the commission the county and every city within the county shall be guided and give due consideration to the general policy and pattern of development set out in the master plan in the authorization, construction, alteration, or abandonment of public ways, public places, public structures, or public utilities. . . .

In spite of the common admonition the board of works, the city council, or the school board proceed with their own short range and usually short-sighted location of new structures. After expending substantial sums for professional study of land use, it is not uncommon for the city fathers to violate the plan and locate the new fire station, the school, the sewage disposal plant or the park without regard to the comprehensive plan which had attempted

1. Typical of such legislation is Indiana Acts 1947, c. 174, §93.

2. *Motor Cargo, Inc. v. Board of Trustees*, 117 N. E. 2d 224 (Court of Common Pleas, Ohio, 1953).

3. Note, *Eminent Domain: Intergovernmental Conflicts*, 29 *INN. L. J.* 206 (1954).

4. Note, *Federal Control of Land To Protect Airport Approaches*, 48 *N. W. L. REV.* 343 (1953); Smylie, *Constitutionality of Federal Airport Zoning*, 12 *GEO. WASH. L. REV.* 1 (1943).

5. "... nothing contained in such compact shall be construed as impairing or in any man-

ner affecting any right or jurisdiction of the United States in and over the region which forms the subject of this compact." 54 *STAT.* 748 (1940). To the same effect, see: 52 *STAT.* 150 (1938); 50 *STAT.* 719 (1936); 49 *STAT.* 932 (1935).

6. *Cresskill v. Dumont*, 28 *N. J. SUPER.* 26, 100 *A. 2d* 182 (1953).

7. *La Salle National Bank v. Chicago*, 4 *ILL.* 2d 253, 122 *N. E. 2d* 519 (1954).

8. See, for example, *Metropolitan Area Planning for Northeast Illinois and Northwestern Indiana*, Metropolitan Housing and Planning Council, 1956.

9. Indiana Acts 1955, c. 283, §36.

to insure sound traffic patterns, quiet and peaceful residential areas and compatibility between commerce, industry and living area.

In most cities the plan commission, although politically independent, is also politically impotent to prevent the other agencies of local government from violating the plan. It is obvious that, even if fine and imprisonment were sanctions against municipal action, it would be politically unrealistic to expect them to be applied to those who hold the real power of local government. Thus, if the city's plan is to be enforceable against it, some other sanction is necessary. One experiment in this direction was attempted in the Indiana Metropolitan Plan Act of 1955.¹⁰ The act applies to the City of Indianapolis, to Marion County, and to all the smaller cities within the county, and as other enabling acts it includes the usual admonitory clause that the cities and the county are to be guided and give due consideration to the general policy and pattern of development set out in the comprehensive plan.

In addition to this customary statement, Section 36 further provides:¹¹

Any action inconsistent with the evidence set forth in the comprehensive plan shall be presumed to be not in the public interest.

This apparently innocuous phrase may provide an effective sanction for the enforcement of the plan against the city and its officials. In effect, this section means that if land is to be taken by eminent domain for a specific purpose inconsistent with the comprehensive plan, proof of this inconsistency will establish presumptively that the taking is not for a public purpose. Likewise, if the governmental unit seeks to issue bonds for the erection of structures

at locations inconsistent with the plan, no cautious bond house will underwrite the bonds nor will its attorneys approve the issue, for presumptively the public interest is not served. The constitutionality of this provision was attacked in *Mogilner v. Metropolitan Plan Commission*.¹² It was alleged that the provision violated Art. 1, §21 of the Indiana Constitution providing that: "... no man's property shall be taken by law without just compensation. ..."

The court rejected this allegation summarily with the statement that the section "does not relate to nor provide for the taking nor condemning of property".

Secondly, it was alleged that "the provision violated the due process provisions of both the Indiana and United States Constitution".

In response to this objection the court said:¹³

It is, therefore, obvious that the "action" referred to in the last paragraph of Section 36 is action by city and county units in authorizing and constructing public improvements. . . . No constitutional requirement is violated by a statute which requires that actions by governmental units must be in the public interest, or as is usually stated, for a public purpose. . . .

Moreover, the last paragraph of Section 36 merely creates a presumption which would be dissolved on showing the existence of public interest to the contrary. The Act does not provide that the presumption created is conclusive. It is well established that statutes which make evidentiary facts prima facie of certain ultimate facts, otherwise described as rebuttable presumptions created by statute, are valid. . . .

With the constitutionality of this provision apparently settled, it appears that further litigation on the point is not likely to arise because the provision is in a sense self-executing, that is, with customary banker's caution, a bonding house would refuse to underwrite an issue rather

than gamble with a lawsuit. If this prediction is correct, then local municipal officials may be bound to respect their own officially adopted plans.

It is doubtful whether the expansion of this section to include all government agencies within the territorial jurisdiction of the plan commission can be effected. Once again the issue of sovereignty arises. No constitutional obstacle stands in the way of a state legislature agreeing that the agencies of the state will abide by the comprehensive plan of a local unit of government. Such action, of course, would not bind future legislatures, but until such a statute was amended or repealed there seems to be no reason why the executive and administrative agencies of government could not be required to comply with the local plan. The big hurdle is that a legislature is not likely to so restrain itself or its state departments or agencies. As between the many agencies of local government—city, town, county, township, special districts, school board, park and recreation district, etc.—the legislature could and probably would, place responsibility for planning in a single unit of government, the city, the county or the metropolitan district.

Perhaps this sanction against independent local action provides one of the less objectionable integrating forces in a metropolitan area. Without the necessity of creating a "super-government", integration of the planning activities of scores and often hundreds of independent governmental units within a metropolitan area might be effected.¹⁴

10. *Ibid.*

11. *Id.*

12. *Ind.*, 140 N. E. 2d 220 (1957).

13. *Supra* note 12, page 225.

14. *Supra* note 8.